BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

To: The Commission

FLORIDA POWER & LIGHT COMPANY'S PETITION FOR RECONSIDERATION AND/OR CLARIFICATION OF THE FIRST REPORT AND ORDER

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EXECUTIVE SUMMARY

In the First Report and Order in the above-captioned proceeding, the Commission determined that Section 224 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, mandates access to utilities' poles, ducts, conduits and rights-of-way on a nondiscriminatory basis. The Commission did not enumerate a comprehensive regime of specific rules, but instead established a few rules supplemented by certain guidelines and presumptions.

Florida Power & Light Company ("FPL") is the fourth largest investor owned electric utility in the United States providing service to over 3.5 million customers. FPL has constructed and maintained a vast infrastructure of poles, ducts, conduits and rights-of-way in order to provide its customers with efficient and reliable electric service. Although FPL believes that the rules set forth in this proceeding fail to fully comprehend the nature of an electric utility's operations, more importantly, FPL believes that the Commission exceeded its statutory authority and violated the Administrative Procedures Act ("APA") in promulgating these rules. Equally significant, FPL believes that many of the proposed rules require vital clarification in order to avoid unduly burdening electric utilities.

As mentioned above, the Commission exceeded in statutory authority in several respects. The plain language of Section 224 affords electric utilities the right to deny access in certain specifically enumerated instances. One of the express bases

provided by Congress allows an electric utility to deny access based on "insufficient capacity." Contrary to express statutory language, the Commission inexplicably determined that: (1) a utility may have to expand capacity to facilitate requests for access; and (2) a utility must allow use of its reserve space until it has an actual need for the space. Because these two determinations are exactly contrary to the unambiguously expressed will of Congress, the Commission must reverse these determinations.

There also is absolutely no statutory basis for the Commission's decision to require utilities to use their eminent domain authority for the benefit of third parties. If Congress had intended to impose such an extraordinary obligation, Congress surely would have done so with explicit statutory language. Similarly, the Commission ignored Congressional intent by: (1) failing to give effect to the notion of negotiated agreements; (2) finding that the Pole Attachment provisions apply to transmission facilities; and (3) determining that an attachment to a single piece of infrastructure for wire communications is attachment to all infrastructure.

Moreover, many portions of the Commission's decision are arbitrary and capricious because the Commission ignored both the procedural requirements of the APA and failed to adequately consider the proposed rules in the context of their application to an electric utility. In this regard, the Commission adopted a 45-day period of time to respond to a request for access and

adopted rules concerning allocation of modification costs without ever noticing such issues.

Finally, FPL believes that clarification of much of the First R&O is essential. First, the Commission should establish that only reasonable efforts are required to provide sixty days advance notice of non-routine or non-emergency modifications. Second, the Commission should clarify that such notice should not interfere with situations where the utility is under a statutory or regulatory duty to provide electric service on a more expedited basis. Third, the Commission should state that the sixty-day notice does not apply to situations where the utility pole owner is relocating at the request of a third party government entity. Fourth, the Commission should clarify that when relocations or modifications are initiated by third parties, the pole owner and the attaching parties are responsible for relocating their own facilities and all must share in the cost of the pole relocation. Fifth, the Commission should state unambiguously that negotiated agreements will supersede FCC rules. Sixth, the Commission should establish procedures for the resolution of complaints that fairly consider the position of both sides of the dispute.

In sum, FPL believes that the Commission should adopt rules that reflect the express will of Congress and more fairly consider the realities of an electric utilities core operations.

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Florida Power & Light Company ("FPL"), through its undersigned counsel and pursuant to Section 1.429 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), submits this Petition for Reconsideration of the First Report and Order, CC Docket No. 96-98, released August 8, 1996 (hereinafter "First R&O"), in the above-captioned proceeding.[1/]

INTRODUCTION

1. FPL is the fourth largest investor owned electric utility in the United States providing service to over 3.5

[1/] First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, released August 8, 1996, 61 Fed. Reg. 45476 (Aug. 29, 1996).

million customers. FPL is a corporation organized and existing under the laws of the State of Florida and is a principle subsidiary of FPL Group, Inc. FPL is regulated by the Florida Public Service Commission ("FPSC"). FPL's service territory covers 27,600 square miles in all or part of 35 Florida Counties, most of the east coast of Florida and the west coast south of the Tampa Bay area, including the municipalities of Miami, Ft. Lauderdale, West Palm Beach, Daytona Beach and Sarasota. FPL electric system consists of approximately 58,000 miles of electric line, and includes one million distribution poles, thousands of miles of conduits, ducts and rights-of-way, all of which is used to provide electric power service to millions of residential and business customers. Because these facilities are used for communications and Florida has not preempted the FCC's jurisdiction, FPL is subject to regulation by the Commission under the federal Pole Attachments Act, 47 U.S.C. § 224, as amended. FPL has a vital interest in, and is directly affected by, those portions of the Commission's First R&O addressing Section 224(f), access and denial of access to poles, ducts, conduit and rights-of-way, and Section 224(h), written notification of intended modifications to poles, ducts, conduits and rights-of-way.[2/]

[2/] The Commission's discussion of these issues is found in ¶s 1119-1240 of the First R&O.

2. In general, FPL seeks reconsideration of the Commission's First R&O in the above-captioned proceeding for the following reasons:

- The FCC exceeded its statutory authority in requiring that parties expand capacity to accommodate requests for access;
- The FCC exceeded its statutory authority in requiring a utility to allow the use of its reserve space until it has an actual need for the space;
- The FCC exceeded its statutory authority in requiring electric utilities to exercise their powers of eminent domain to expand capacity for third party telecommunications carriers;
- The FCC failed to provide sufficient notice of agency action in requiring that access to poles be granted within 45 days of a request for access;
- The FCC's decision that any type of equipment can be placed on a utility's infrastructure is an impermissible construction of the Pole Attachments Act;
- The FCC's determination that a utility may not restrict access to infrastructure to its own highly skilled and trained employees is arbitrary and capricious;
- The Commission improperly promulgated rules implementing Section 224(i) of the Pole Attachments Act in a rule making relating to Section 224(h);
- The FCC violated the express language of the Pole Attachments Act in requiring uniform application of the rates, terms and conditions of access because that requirement fails to give effect to the statutory provision for voluntary negotiations;
- The FCC violated the express language of the Pole Attachments Act in finding that transmission facilities are subject to access; and,
- The FCC violated the plain language of the Pole Attachments Act to the extent it concluded that the use of any single piece of infrastructure for wired communications triggers access to all other infrastructure.

3. In addition, FPL seeks clarification concerning the following issues because the intent of the Commission is unclear from its decision:

- Only reasonable efforts are required to provide sixty days advance notice of non-routine or non-emergency modifications;
- The sixty-day notice requirement cannot be applied so as to interfere with FPL's statutory duty to provided electric service on terms and conditions as required by Florida law;
- The sixty-day notice provision does not apply to situations where the utility pole owner is relocating at the request of a third party, such as the Florida Department of Transportation, local government, or any other government entity;
- When relocations or modifications are initiated by third parties, the pole owner and the attaching parties are responsible for relocating their own facilities and all must share in the cost of the pole relocation;
- Negotiated agreements between parties will supersede FCC rules on modifications and notifications; and
- The procedures for resolution of access complaints include full consideration of the position of both the complainant and the respondent.

4. These aspects of the Commission's First R&O, if allowed to stand, will have a direct and adverse effect on FPL. For this reason and in light of its participation in the rule making proceedings below[3/] by which the Commission promulgated the

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3/ FPL participated in the Comment and Reply Comment stage of this proceeding as a Joint Commenter and Joint Reply Commenter with 16 other utilities. See Comments of American Electric Power Service Corp. et al. (May 20, 1996) (hereinafter "Infrastructure Owners Comments"); Reply Comments of American Electric Power Services Corp. et al. (June 3, 1996) (hereinafter "Infrastructure Owners Reply Comments").

First R&O, FPL has standing to seek reconsideration and clarification of the First R&O, as fully discussed herein.[4/]

ARGUMENT

I. Applicable Legal Standards

5. An agency construing a statute should be mindful of the two-step inquiry set forth by the Supreme Court.[5/] The first step is to determine if Congress has directly spoken to the issue. If the intent of Congress is clear, either from the language of the statute itself or from the use of "traditional tools of statutory construction," an agency, like a reviewing court, must give effect to the unambiguously expressed will of Congress.[6/] Furthermore, courts require that an agency adequately articulate the reasons underlying its construction of a statute so that a reviewing court can properly perform the analysis set forth in Chevron.[7/]

[4/] See Panhandle Eastern Pipeline Co., 4 F.C.C. Rcd 8087, 8088 (1989).

[5/] Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

[6/] ACLU v. Federal Communications Comm'n, 823 F.2d 1554, 1568 (D.C. Cir. 1987) (citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985)).

[7/] See Acme Die Casting v. NLRB, 26 F.3d 162, 166 (D.C. Cir. 1994); Leeco v. Hays, 965 F.2d 1081, 1085 (D.C. Cir. 1992) ("In the absence of any explanation justifying [the agency's position] as within the purposes of the act . . . , we are unable to sustain the Commission's decision as reasonably defensible.").

6. In the sections that follow, FPL demonstrates that the Commission has failed to follow these well-settled principles of statutory construction in a number of instances in promulgating rules to implement new Sections 224(f) and 224(h) of the Pole Attachments Act. Accordingly, the Commission must use the process of reconsideration and clarification to correct clear errors in its decision.

II. Reconsideration Is Mandated Because the Commission Exceeded Its Statutory Authority

A. The Commission Exceeded Its Statutory Authority in Requiring that Utilities Expand Capacity to Accommodate Requests For Access[8/]

7. The Commission's determination that utilities must expand capacity to accommodate requests for access is contrary to the express intent of Congress. In the First R&O, the Commission reasoned that because "[a] utility is able to take the steps

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8/ In the Infrastructure Owners Comments and Reply Comments in the rulemaking proceedings below, the Infrastructure Owners argued that, to the extent the Commission interprets Section 224(f) as mandating access to utilities' poles, ducts, conduits and rights-of-way, the statute raises serious constitutional questions. Although the Commission held that Section 224(f)(1) imposes mandatory access on utilities, unless one of the exceptions provided in Section 224(f)(2) for denials of access is applicable, see, e.g., First R&O, ¶ 1187, it declined to address the constitutionality of mandated access. The Commission held that it did not have jurisdiction to decide the constitutionality of a federal statute. Id. Because the FCC has already acknowledged its lack of jurisdiction to address the constitutionality of mandated access, FPL has not argued that question here. The failure to argue this issue, however, should not be interpreted as an admission on the part of the FPL that Section 224(f)(1) is capable of a constitutionally valid interpretation or as a waiver of any right to challenge the constitutionality of Section 224(f)(1) in any other proceeding or forum.

necessary to expand capacity if its own needs require such expansion[,] [t]he principle of nondiscrimination established by Section 224(f)(1) requires that [a utility] do likewise for telecommunications carriers and cable operators."[9/] Based on this reasoning, the Commission determined that "lack of capacity on a particular facility does not automatically entitle a utility to deny a request for access," and therefore "before a utility can deny access it must explore all accommodations in good faith."[10/]

8. The Commission's interpretation of the nondiscrimination provision fails to give effect to the limitations set forth in Section 224(f)(2). The plain language of Section 224(f)(2) clearly gives a utility the right to deny access based on insufficient capacity. Section 224(f)(2) states:

> Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its pole, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

The only qualification that Congress determined to include in this section is that any denial of access due to insufficient capacity must be done on a "nondiscriminatory basis." This language is unambiguous and, as such, lends itself to only one

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9/ First R&O, ¶ 1162.

10/ Id.

interpretation. An electric utility has the right to deny access if it determines that there is insufficient capacity, so long as that determination is made on a nondiscriminatory basis.

9. Although the plain language of the statute includes only one qualification, the Commission's interpretation reads another substantial qualification into the statute. According to the Commission's interpretation, Section 224(f)(2) would read as follows, qualifying the right to deny access based on insufficient capacity:

> Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity, **and the utility cannot reasonably modify its facility to increase such capacity**, and for reasons of safety, reliability and generally applicable engineering purposes.

If Congress had intended to further qualify a utility's right to deny access, Congress would have drafted the statute to include such language.

10. Section 224(f)(2) manifests Congress's understanding that "a utility providing electric service" must be given wide latitude in making determinations concerning access to its infrastructure because of the nature and importance of the underlying service for which the infrastructure is used -- electric service. Clearly, Congress intended to bestow on electric utilities the "right" to make this determination without

having to justify a decision not to expand its capacity. Section 224(f)(2) reveals Congress's conclusion that the determination of whether sufficient capacity exists to accommodate access to a pole, duct, conduit or right-of-way must be left to the judgment of the electric utility, based on its assessment of whether such access comports with safety, reliability and generally applicable engineering standards.

11. The Commission's conclusion that a utility must seek to accommodate a request for access by expanding capacity defies the plain and unambiguous statutory right afforded electric utilities in Section 224(f)(2). The most glaring fault in the Commission's logic is its attempt to expand the nondiscrimination principle in Section 224(f)(1) so that a telecommunications carrier requesting access is afforded the same infrastructure rights that a utility has when performing its core utility services. Indeed, this interpretation of the nondiscrimination provision in Section 224(f)(1) conflicts with the Commission's own observation that "the nondiscrimination requirement of Section 224(f)(1) . . . prohibits a utility from favoring itself or its affiliates with respect to the provision of telecommunications and video services."[11/] Thus, a utility's ability to expand capacity for its core electric utility services should have no bearing nor confer a similar right on telecommunications carriers seeking access to such facilities.

11/ First R&O, ¶ 1168.

B. The Commission Exceeded Its Statutory Authority by Requiring a Utility to Allow the Use of Its Reserve Space Until It Has an Actual Need for the Space

12. In the First R&O, the Commission determined to allow "an electric utility to reserve space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service."[12/] The Commission further decided that "[t]he electric utility must permit use of its reserved space by cable operators and telecommunications carriers until such time as the utility has an actual need for that space."[13/]

13. As discussed in Section A above, Congress plainly and unambiguously gave electric utilities the right to make capacity determinations when considering requests for access. A denial need only be administered in a nondiscriminatory manner vis-a-vis cable operators and telecommunications carriers. Nothing in Section 224(f)(2) limits a utility's ability to plan for future expansion by reserving capacity. Indeed, Congress was well aware of an electric utility's need to reserve capacity when it gave utilities the right to deny access based on insufficient capacity. If Congress had intended to change the status quo, Congress would have included language in the statute which could reasonably be interpreted to limit this utility practice. Thus,

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12/ First R&O, ¶ 1169.

13/ Id.

the Commission's determination to further qualify a utility's right to reserve capacity violates Congressional intent.

14. As noted above, the Commission determined to limit a utility's right to use its reserve space to instances where such reservation is "consistent with a bona fide development plan that reasonably and specifically projects a need for that space." This standard is vague, ambiguous and unworkable, and ignores the realities of a utility's core business of providing electric service. Currently, FPL's development plans are volatile because of the extreme uncertainty in the electric utility business. FPL is at the beginning of a period of transition brought about by the federal government's efforts to deregulate the electricity supply business. As a result, FPL's expansion plans for transmission lines have radically changed in the recent past, and such plans are likely to change radically again due to deregulation. FPL has significant sections of rights-of-way that were acquired to allow for the expansion of transmission service to areas that will require additional facilities due to load growth. By restricting FPL's right to reserve capacity, the Commission is forcing FPL to either expand its business based on sheer speculation of load growth, or to face repeated complaints by entities seeking access to reserve capacity. The provision of safe, reliable electric service cannot be conditioned on a utility's ability to satisfy this unworkable standard. For this

reason, FPL believes the Commission's determination on reserve capacity is unworkable and must be reversed.

15. As a practical matter, the reservation of capacity must remain within the exclusive authority of the utility, and any reservation of space by a utility should be considered presumptively reasonable. Just because a utility is not currently using "capacity" does not mean that such capacity should be available for use by others, such as telecommunications carriers and cable companies. Utilities routinely allocate certain space to be used in the event of an emergency. For example, if ducts collapse, the utility's contingency plan calls for the immediate substitution of other ducts. Surely, this space can not be considered "reserve" for the purposes of allowing telecommunications carriers and cable companies access to such capacity.

16. The idea that a party can use space on an interim basis is simply impractical and unworkable. Once telecommunication carriers and cable companies are using a utility's infrastructure, and serving significant telecommunication interests, a utility simply will not be able to recapture such reserved space in the time necessary to effectively serve its core utility business. Indeed, according to the Commission, at the time the utility seeks to recapture its reserve space, the utility must provide the user an "opportunity

to . . . maintain its attachment" by expanding capacity.[14/] This requirement seemingly would obligate the utility to allow the user to stay on or in the facility until the utility constructed additional capacity for itself. A utility's ability to provide dependable service would be severely threatened by such an obligation because of the significant engineering and construction time involved in expanding capacity.

17. Even if the Commission crafted a rule that allowed a utility to immediately recapture its reserve space, in the real world, once a telecommunications carrier or cable company is using a utility's infrastructure, it will be difficult to reclaim such capacity. Telecommunications carriers simply will not vacate a utility's facility short of litigation if such withdrawal will likely result in the interruption of service to its telecommunications customers. For this reason, any requirement to allow telecommunications carriers and cable companies access to a utility's reserve space will effectively eliminate a utility's use of that space altogether. As such, the Commission's determination on access to reserve space is arbitrary and capricious and must be reversed.

[14/] First R&O, ¶ 1169.

C. The FCC Has No Authority to Require Electric Utilities to Exercise Their Powers of Eminent Domain to Expand Capacity

18. In its discussion of access to poles, conduits, and rights-of-way in the First R&O, the FCC articulates its view of utilities' obligations with regard to private property rights. Specifically, the FCC states:

> We believe that a utility should be expected to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments.[15/]

In support of this position, the FCC further states:

> Congress seems to have contemplated an exercise of eminent domain authority in such cases when it made provisions for an owner of a right-of-way that 'intends to modify or alter such...right-of-way...'.[16/]

The FCC's position goes well beyond Congressional intent or any reasonable construction of Section 224 with regard to access to utility infrastructure. Requiring electric utility owners to not only provide access to established rights-of-way, but also to condemn new properties at the request of telecommunications carriers is without any support in the statute. Accordingly, this position must be reconsidered.

19. As the FCC notes in the First R&O, the scope of a utility's ownership or control of an easement or right-of-way is

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15/ First R&O, at ¶ 1181 (footnote omitted).

16/ Id. (footnote omitted).

a matter of state law.[17/] Many states do not authorize utilities to condemn property for any use other than their own utility operations.[18/] Many other states, in addition to the states identified to the FCC in the Comments, limit the exercise of eminent domain authority.[19/]

20. In the First R&O, the FCC has posited eminent domain authority as a vehicle for access to rights-of-way by telecommunications carriers. Considering, however, that powers of eminent domain are conferred by, and regulated under, state

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[17/] First R&O, ¶ 1179.

[18/] See, e.g., Comments of Duquesne Light Company, at 15, n.26, identifying the States of Florida, Georgia, New Hampshire, New Mexico and Virginia; Comments of PECO Energy, identifying the Commonwealth of Pennsylvania as having such restrictions in place.

[19/] Alabama, Ala. Code § 10-5-4 (1996), Arkansas, Ark. Stat. Ann. § 18-15-503 (1995), California, Cal. Pub. Util. Code § 612 (Deering 1996), Delaware, Del. Code Ann. § 901 (1995), Indiana, Ind. Code Ann. § 32-11-3-1 (Burns 1996) Minnesota, Minn. Stat. § 300.4 (1995), Texas, Tex. Rev. Civ. Stat. art. 1436 (1996), Wisconsin, Wis. Stat. § 32.02 (1994), all restrict the exercise of eminent domain authority to purposes that further the utility's own operations. The Ohio Code, for example, provides:

> Any company organized for manufacturing, generating, selling, supplying, or transmitting electricity, for public and private use. . . may appropriate so much of such land, or any right or interest therein, including any trees, edifices, or building thereon, as is deemed necessary for the erection, operation, or maintenance of an electric plant, including its generating stations, substations, switching stations, transmission and distribution lines, poles, towers, piers, conduits, cables, wires, and other necessary structures and appliances.

Ohio Rev. Code Ann. § 4933.15 (1996).

law, Section 224 confers no jurisdiction to the FCC to dictate the scope or the terms of their application. Despite this jurisdictional deficiency, the FCC has articulated a position that would result in a de facto preemption, unauthorized by Congress, of the states' jurisdiction over the exercise of eminent domain authority.

21. The FCC's position that a requesting carrier would, or could, be granted the right to piggy back on the eminent domain powers of the electric utility at all--let alone by merely making a request for attachment--is preposterous. An electric utility obtains the power to condemn private or public property within the state by express legislative delegation of the state's sovereign power of eminent domain. The exercise of the power of eminent domain is said to be one of the most harsh proceedings known to the law.[20/] This power is strictly construed and is limited to those powers expressly conferred by statute.[21/] As such, the electric utility may not condemn more land than it needs for its core electric business.

22. Moreover, before a Florida electric utility may condemn, it must obtain a resolution from its Board of Directors which has the responsibility for determining need. Even the

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[20/] Peavey-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 31 So.2d 483 (1947).

[21/] Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale, 315 So.,2d 451 (Fla. 1975).

courts cannot question this determination of need by the Board because a landowner is limited to raising only the affirmative defense of bad faith or abuse of discretion in such determination.[22/] Congress in Section 224 did not intend, and the FCC has no authority to, require the Board of Directors of an electric utility to make determinations of need for a telecommunications company.

23. Equally important, the State of Florida has not delegated its sovereign power of eminent domain to cable television companies. Section 73.161 of the Florida Statutes (1995) provides only that telephone and telegraph companies may condemn railroad rights-of-way. The law of Florida does not allow cable television companies or telephone companies to piggy back on the eminent domain powers of the electric utility.

24. Therefore, this extraordinary result of requiring an electric utility to exercise its delegated state sovereign power to condemn for a party requesting a pole attachment was not contemplated by Congress, which is supported by the specific provisions detailing the respective extent of federal and state jurisdiction over such matters. Had Congress intended to dramatically rework local regulation of eminent domain authority, it would have done so expressly in the Telecommunications Act of

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[22/] City of Jacksonville v. Griffin, 346 So.2d 988 (Fla. 1977).

1996 ("1996 Act").[23/] Instead, Congress expressly and clearly preserved the states' jurisdiction to determine who will exercise eminent domain authority and the circumstances under which it will be exercised.[24/]

25. In summary, neither the structure, nor the language, of Section 224 is consistent with an obligation on the part of utilities to exercise eminent domain authority on behalf of a third party. Although that section may require utilities to grant access under certain conditions to facilities already in existence, an obligation to take independent, affirmative steps to secure new rights-of-way solely for the benefit of a telecommunications carrier is an extraordinary obligation and was neither contemplated nor authorized by Congress.

III. Reconsideration Is Mandated Because the Commission's Rules Are Arbitrary and Capricious

A. The FCC's Requirement that Utilities Provide Access to Infrastructure Within Forty-Five Days Is Arbitrary and Capricious Because the Agency Failed to Provide Notice of Agency Action

26. Newly promulgated Section 1.1403 of the Commission's rules incorporates the duty to provide access to a utility's infrastructure:

> Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable

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[23/] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[24/] See, e.g., 47 U.S.C. § 253(b).

> operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. . .[25/]

27. Reconsideration of this section is mandated because the agency failed to address this issue in its Notice of Proposed Rule Making (NPRM) and failed to provide any reasoned basis for the requirement in its First R&O. Thus, the requirement was adopted in violation of the Administrative Procedure Act ("APA").[26/]

28. Pursuant to Section 10 of the APA, a court will set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[27/] In determining whether agency action is arbitrary and capricious, a reviewing court will first consider whether the agency has considered the relevant factors involved and whether there has been a clear error of judgment.[28/] The agency must articulate a "rational connection between the facts found and the choice

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[25/] 47 C.F.R. § 1.1403. It is unclear from the rule whether the 45-day deadline represents the amount of time in which a utility has to respond to a request for access, or whether it represents the time allowed a utility to grant physical access to its infrastructure. The latter interpretation, as discussed below, imposes significant, unreasonable burdens upon utilities, apart from the procedural irregularities raised by the requirement.

[26/] 5 U.S.C. § 551 et seq.

[27/] 5 U.S.C. § 706(2)(A).

[28/] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).